

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JUDIE ENDICOTT

Claimant

VS.

RIVERSIDE HEALTH SYSTEMS

Respondent

AND

PHICO INSURANCE COMPANY

KANSAS GUARANTEE ASSOCIATION

Insurance Carrier

Docket No. 228,533

ORDER

Respondent and its insurance carrier (respondent) appealed Administrative Law Judge (ALJ) John D. Clark's Award dated September 28, 2001. Also, claimant appealed the ALJ's December 12, 2001, Order denying penalties. This Order addresses both appeals. The Appeals Board (Board) heard oral arguments in both appeals on April 12, 2002, in Wichita, Kansas.

APPEARANCES

Walter E. Craig of Wichita, Kansas, appeared for the claimant. Scott J. Mann of Hutchinson, Kansas, appeared for respondent and its insurance carrier, Phico Insurance Company and the Kansas Guarantee Association.¹

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, during oral argument before the Board, the parties agreed that the

¹ During the pendency of this appeal, the Board was notified that Phico Insurance Company was placed into liquidation and the Kansas Guarantee Association assumed the defense of this claim.

record should include the transcript of the July 31, 2001 deposition of Will Stricker. The parties further agreed that the Board could decide this case, rather than remand the matter to the ALJ for a decision based upon the entire record. As this Order includes claimant's appeal from the ALJ's post-award Order, the record also includes the December 11, 2001, hearing on claimant's Motion for Penalties together with the pleadings contained in the administrative file.

ISSUES

As a result of the parties' stipulation at oral argument, the respondent's request for remand contained in its Application for Review by the Board is no longer an issue. The remaining issues are:

1. What is the nature and extent of claimant's disability?
2. When respondent does not dispute compensability and claimant's entitlement to temporary total disability benefits, is claimant entitled to penalties for unpaid temporary total disability benefits the ALJ ordered paid if respondent filed a timely appeal?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Scheduled vs. General Body Disability

The Board first considers whether the claimant should have been compensated for a permanent partial general disability or for a scheduled injury to the right upper extremity. Under the Kansas Workers Compensation Act, K.S.A. 44-501, *et seq.*, injuries such as claimant's, which do not result in death or total disability, may be compensated either as partial general disabilities, K.S.A. 1996 Supp. 44-510e, or as scheduled injuries, K.S.A. 1996 Supp. 44-510d. If an injury is listed in the K.S.A. 1996 Supp. 44-510d schedule of injuries, then compensation for the injury and resulting disability is limited to those benefits set forth in K.S.A. 1996 Supp. 44-510d.

Pursuant to K.S.A. 1996 Supp. 44-510e, the ALJ determined that claimant sustained permanent partial general disability as the result of her work-related accident. In particular,

the ALJ found that claimant suffers from a 20 percent² whole body functional impairment and 85 percent work disability attributable to the accident. On appeal, respondent first argues that the ALJ erred because the preponderance of the evidence supports that claimant sustained only a right upper extremity injury and resultant disability. While the Board is mindful that Dr. Philip Mills' opinion regarding permanent impairment of function supports respondent's argument, the Board finds the opinion unpersuasive since Dr. Mills specifically noted in his report that his examination focused on claimant's right shoulder.³

The evidence in the record reflects that claimant injured her right shoulder on or about April 28, 1997, during the course and in the scope of her employment with respondent. Initially, physicians were unable to determine the nature of the injury. After almost one year passed, on April 14, 1998, Dr. Bernard Hearon performed an exploration diagnostic arthroscopy under anesthesia and found a partial tear of claimant's right rotator cuff. Claimant's condition did not improve, and Dr. Hearon ultimately performed an open shoulder surgery exploration wherein he performed an additional right rotator cuff repair in August 1998. Claimant's condition still did not improve. In fact, her medical records reveal that her pain and problems actually increased to include not only chronic shoulder pain, but also scapular winging and chronic neck pain.

The Board finds that the preponderance of the credible medical evidence supports that claimant sustained a permanent partial general disability as the result of her work-related accident. According to *Reese v. Gas Engineering & Construction Co.*, 219 Kan. 536, Syl. ¶ 2, 548 P.2d 746 (1976), "[W]hen a workman's injury results in objective physical damage to a member of his body which is included in the schedule under K.S.A. 44-510d such injury may not preclude compensation for general bodily disability if an unscheduled part of his body also becomes disabled as a direct and natural consequence of the physical damage to the scheduled member." Under *Reese*, in order for claimant to be entitled to a finding of general bodily disability, she had to prove that, as a result of her shoulder injury, she suffered functional disability to an unscheduled part of her body. The Board has reviewed the record in this case and finds that claimant sustained this burden through Dr. Richard Piazza's medical opinion and Dr. Pedro Murati's medical opinion.

Dr. Piazza, an "osteopathic certified family physician and occupational physician"⁴ was respondent's employee, one of claimant's treating physicians, and he also performed

² The ALJ based his opinion on Dr. Richard Piazza's medical opinion. Dr. Piazza's opinion reflected a 24% permanent impairment of function. The AJL's decision apparently contains a typographical error in this regard.

³ Mills Depo., Ex. 1 at 8.

⁴ Piazza Depo. at 5.

an independent medical examination at claimant's request. During Dr. Piazza's physical examination of claimant, he noted that claimant not only experienced physical discomfort in her right shoulder and right upper extremity, but also experienced pain radiating into her right back, neck and scapular areas. Based on his examination, his review of claimant's medical records, and his treatment history with claimant, Dr. Piazza opined that claimant suffered "chronic, recalcitrant right internal derangement shoulder pain syndrome status post surgery . . .," "right shoulder induced chronic back pain and chronic somatic dysfunction of the cervical and thoracic junction and thoracic spine," "chronic muscle tension cephalgia syndrome as a causal relationship to her chronic right shoulder pain," "fatigue, anxiety and depression due to her chronic pain syndrome," "status post second surgery induced wing scapula syndrome," and "narcotic pain medication dependence for pain control of her right shoulder discomfort syndrome, muscle tension cephalgia and muscle spasms."⁵ Dr. Piazza further opined that the foregoing conditions were causally related to her work-related accident, and claimant sustained a resulting combined 24 percent whole body permanent impairment rating based on the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.) (AMA Guides 4th).

Respondent attempted to undermine the credibility of Dr. Piazza's opinion by pointing out that his impairment rating for pain in the cervical and thoracic regions was inconsistent with the AMA Guides 4th. However, when questioned about that portion of his rating, Dr. Piazza responded that he assigned the rating based on "somato reflexes where one portion of the body affects the other."⁶ In other words, Dr. Piazza determined that claimant's shoulder injury produced chronic pain and problems in claimant's cervical and thoracic spine despite the fact that he found no objective signs of physical injury. The Board finds that while Dr. Piazza's opinion is not based entirely on AMA Guides, it is nevertheless consistent with K.S.A. 1996 Supp. 44-510e since somato reflexes involving the cervical and thoracic spine are not "contained" in the AMA Guides 4th. Moreover, the Board finds that Dr. Piazza's opinion supports that claimant suffered functional disability to an unscheduled part of her body as a result of her shoulder injury.

Dr. Murati, a physician board certified in physical medicine and rehabilitation, also testified on claimant's behalf. He examined claimant on two separate occasions, the last time on March 30, 2000. After this examination and pursuant to the AMA Guides 4th, Dr. Murati assigned claimant a 30 percent permanent impairment rating attributable to her work-related injury. Like Dr. Piazza, Dr. Murati found that a portion of claimant's resultant disability involved her neck.

⁵ Piazza Depo., Ex. 2.

⁶ Piazza Depo. at 35.

The Board finds that Dr. Piazza's medical opinion, coupled with Dr. Murati's medical opinion, satisfy the *Reese* requirement that claimant prove that, as a result of her shoulder injury, she suffered functional disability to an unscheduled part of her body, *i.e.*, her neck. However, despite the similarities between these two physician's opinions, dramatic differences exist between their respective impairment ratings. For instance, Dr. Piazza attributes claimant's neck pain to "somato reflexes," whereas Dr. Murati attributes the pain to a muscle sprain or strain. Moreover, contrary to Dr. Piazza, Dr. Murati assigned a rating for right carpal tunnel syndrome, right cubital tunnel syndrome, and a left upper extremity impairment. Like the ALJ, the Board finds that Dr. Piazza, as claimant's long-term treating physician, was in a better position to assess what functional impairment claimant had from her work-related accident. The Board, therefore, adopts Dr. Piazza's impairment rating and finds claimant is entitled to a 24 percent whole body functional impairment.

Work Disability

The AJL determined that claimant was entitled to work disability benefits. He did so by finding that "[c]laimant has made a bonafide effort to return to work and has not only failed to secure employment but has been accepted by the Social Security Administration for Social Security Disability benefits and therefore she is entitled to a permanent partial disability award based on a work disability as set out in K.S.A. 44-510e(a)."⁷ The Board disagrees with the ALJ's analysis and reasoning.

Permanent partial general disability is determined by the formula set forth in K.S.A. 1996 Supp. 44-510e, which provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

⁷ ALJ's Award at 6.

But this statute must be read in light of *Foulk* and *Copeland*.⁸ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44- 510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.

Other than claimant's attempts to return to work for respondent and her brief employment at the Wichita Clinic, the evidence of record does not support that claimant diligently sought work in the open labor market. And the undisputed evidence of record establishes that work was available in claimant's area that would have accommodated her medical restrictions.⁹ Accordingly, while the Board finds respondent did not accommodate claimant's medical restrictions, the Board further finds that claimant nevertheless failed to make a good faith effort to obtain and retain post-injury employment as required by the principles set forth in *Foulk* and *Copeland*.

As for post-injury average weekly wage, the Board imputes the wage claimant was earning while working for the Wichita Clinic because the preponderance of the evidence supports that she had the ability to perform that job and, therefore, earn that wage. Claimant left that employment due to the death of her mother, not her work-related injury and disability. The Director of Human Resources for the Wichita Clinic testified on respondent's behalf. According to his testimony and claimant's resignation letter in her personnel file, claimant resigned from the clinic for personal reasons. In particular, claimant's resignation letter states, "This decision was made for personal reasons with the things going on in my life at this time I felt I could not give my dept. what it required to be a productive employee."¹⁰ Additionally, claimant's personnel file contains an employer note dated July 26, 2000, memorializing the fact that claimant informed her employer that her job was not too demanding, that she could perform the job, and that she wanted to continue the job.

⁸ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁹ Hardin Depo. at 22-23.

¹⁰ Stricker Depo., Ex. 1.

The Board finds that the preponderance of the evidence supports that Wichita Clinic would still employ claimant but for claimant's voluntary termination based on personal reasons unrelated to her injury and disability. In that capacity, claimant earned \$340.00 per week, or 92 percent of her pre-injury average weekly wage. The record does not establish claimant acted in good faith in leaving that job nor did she thereafter make a good faith effort to find other appropriate employment. Thus, the Board finds that claimant is not entitled to work disability benefits since she is capable of earning 90 percent or more of her pre-injury average weekly wage.

Penalties

Next, claimant argues that the ALJ erred when he denied claimant's entitlement to penalties pursuant K.S.A. 44-512a. According to K.S.A. 44-512a:

In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due and in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill, if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.

In essence, claimant argues that because respondent did not appeal the ALJ's award of additional temporary total disability, the underpayment of temporary total disability benefits is a past due and owing benefit under the foregoing statute. Conversely, respondent directs the Board's attention to K.S.A. 44-551(b). According to respondent, under this statute, payment of benefits under the ALJ's Award was stayed until 30 days after the Board heard oral arguments in this matter on April 12, 2002. In this regard, K.S.A. 44-551(b)(2)(B) provides:

If an order on review is not issued by the board within the applicable time period prescribed by subsection (b) (1), medical compensation and any disability compensation as provided in the award of the administrative law

judge shall be paid commencing with the first day after such time period and shall continue to be paid until the order of the board is issued, except that no payments shall be made under this provision for any period before the first day after such time period. Nothing in this section shall be construed to limit or restrict any other remedies available to any party to a claim under any other statute.

Moreover, respondent directs the Board's attention to K.S.A. 44-551(b)(2)(c) and argues that the only exception to the foregoing is payment of medical compensation when compensability is not an issue. The statute provides:

In any case in which the final award of an administrative law judge is appealed to the board for review under this section and in which the compensability is not an issue to be decided on review by the board, **medical compensation** shall be payable in accordance with the award of the administrative law judge and **shall not be stayed pending such review**. The employee may proceed under K.S.A. 44-510k and amendments thereto and may have a hearing in accordance with that statute to enforce the provisions of this subsection."

The Board finds that respondent's argument is consistent with the plain and unambiguous language of K.S.A. 44-551(b). Additionally, the Board has previously addressed the foregoing statutory provisions and determined that when awards are appealed from an Administrative Law Judge to the Board, the Board has 30 days from the date of argument to issue its decision. If the Board fails to render its decision within that 30 day period, the employer must begin paying the weekly disability compensation that the Administrative Law Judge awarded that accrues beginning the 31st day following argument. But any disability compensation that accrued before that 31st day is stayed.¹¹

The ALJ's Award is dated September 28, 2001. On October 2, 2001, claimant demanded payment of unpaid temporary total disability benefits as required by K.S.A. 44-512a. However, respondent timely appealed the Award on October 5, 2001, prior to claimant filing her Motion for Penalties on November 9, 2001. The Appeals Board did not hear oral arguments in this matter until April 12, 2002. Based on the plain and unambiguous language of K.S.A. 44-551(b) and the Board interpretation in the foregoing cases, claimant's argument regarding penalties fails.

¹¹ *Landry v. Graphic Technology, Inc.*, Docket No. 216,166, 1998 WL 847149 (Kan. WCAB (Nov. 30, 1998); *Stover v. Skyline Corporation*, Docket No. 163,921, 1995 WL 447161 (Kan. WCAB Jun. 16, 1995)(Payments are not required to be made for any period before the first day after the thirty (30) days).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated September 28, 2001, is modified as follows:

Claimant is granted an award of workers compensation benefits from respondent, its insurance carrier and the Kansas Guarantee Association for an April 28, 1997, accident and resulting disability. Based upon an average weekly wage of \$368.41, claimant is entitled to receive 79.84 weeks of temporary total disability compensation at \$245.62 per week, or \$19,610.30, followed by 84.04 weeks of permanent partial disability compensation at \$245.62 per week, or \$20,641.90, for a 24 percent permanent partial general disability and a total award of \$40,252.20, all of which is due and owing and is ordered paid in one lump sum less any amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of February, 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: W. Walter Craig, Attorney for Claimant
Scott J. Mann, Attorney for Respondent, PHICO & Kansas Guarantee Assn.
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation